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No. 87-1698

In The

Supreme Court of the United States

October Term, 1987

JOHN E. MALLARD,

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Is 28 U.S.C. Section 1915(d) so unambiguous that rational and substantial legal argument on its construction cannot be made, so that a pretrial petition for mandamus to the district court must be granted?

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The Respondent United States District Court for the Southern District of Iowa respectfully suggests that the premature petition for certiorari be denied.

OPINION BELOW

The Court of Appeals for the Eighth Circuit did not write an opinion, and its order is contained in the appendix to the petition, page la. The ruling of the United States District Court for the Southern District of Iowa (Vietor, C.J.,) has not been reported. It is reprinted in the appendix to the petition, page 2a. Judge Vietor relied

upon the reasoning contained within a prior ruling, *Coburn v. Nix*, Civil No. 86-716-B (S.D. Iowa, June 16, 1987). That decision has not been reported. It is reprinted in the appendix to this Brief in Opposition, page 1a, *infra*.

STATEMENT OF THE CASE

Two inmates at the Iowa State Penitentiary at Fort Madison, Iowa, and one former inmate collectively brought an action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Iowa. The inmates complained that various prison guards and officials had filed false disciplinary reports against them, mistreated them physically and endangered their lives by exposing their role as informants. *Traman, et al., v. Steve Parkin, et al.*, Civil No. 87-317-B.[1] Concurrently with a finding of their indigency, on June 3, 1987, the District

[1]Defendants in the underlying action as Iowa state employees were entitled to and did receive legal representation through the office of the Attorney General. The undersigned counsel appeared on behalf of those defendants. Throughout the course of these proceedings on the § 1915(d) question, these defendants have perceived no legal interest and have not participated. At the request of Judge Vietor, the undersigned counsel is opposing the petition for certiorari on behalf of the District Court. Although the defendants still have no legal interest in the current procedural posture of the case, and even though at first glance counsel's position might be perceived to be a conflict of interest, nevertheless, in a very practical sense, defendants have an interest in effective and efficient advocacy leading to more just results.

Court appointed Petitioner to represent plaintiffs pursuant to 28 U.S.C. § 1915(d). On June 25, 1987, Petitioner filed with the magistrate for the Southern District a motion to withdraw as counsel pursuant to Local Court Rule 1.5.7 asserting "good cause" and addressed to the discretion of the magistrate. Petitioner cited his "incompetency" due to lack of experience in trials in general and civil rights trials specifically. On July 7, 1987, the magistrate denied his motion.

Pursuant to Local Court Rule 4.3.1, Petitioner appealed to the District Court asserting abuse of discretion and also moved to "dismiss" the order of appointment as beyond the power of the District Court. On October 27, 1987, the District Court denied the Petitioner's motion to dismiss his appointment, and subsequently on November 5, 1987, denied his request to add the statement required by 28 U.S.C. § 1292(b) for immediate appeal. The denial of that request was based upon Judge Vietor's view that " . . . I do not believe that an immediate appeal from my ruling would materially advance the ultimate termination of this litigation, which is Mr. Traman's litigation against the defendants". Appendix to this Brief, p. 8a.

Thereafter, on November 27, 1987, Petitioner filed a petition for writ of mandamus with the Eighth Circuit Court of Appeals requesting that the District Court be directed to dismiss his order of appointment as counsel for plaintiffs Traman, et al. That petition was denied on December 7, 1987. Petition for certiorari to the Eighth Circuit was filed with this Court on March 7, 1988, invoking the jurisdiction of this Court pursuant to 28 U.S.C.

§ 1254(1). No action to date has been taken on the underlying complaint.

SUMMARY OF ARGUMENT

The petition for mandamus was filed in lieu of an interlocutory appeal in a case still pending in the District Court. Its denial by the Eighth Circuit was required under the procedural posture of the case because rational and substantial legal arguments existed in support of the action of the District Court. Mandamus in lieu of subsequent appeal is severely limited. Review of that interlocutory ruling by certiorari in this Court is not only premature but inappropriate.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Petition For Writ of Mandamus Was Premature, And Properly Denied.

The procedural posture of the underlying case and the method by which Petitioner seeks to present his question for review is paramount. The underlying action filed by plaintiffs Traman, et al. on May 28, 1987, remains pending for want of any activity. The order denying his request to withdraw was not immediately appealable to the Eighth Circuit. His request for a 28 U.S.C. § 1292 statement was denied. His chosen course of conduct was then a petition for writ of mandamus. That petition was reviewed within well-established guidelines.

> [T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980). Limited to "exceptional circumstances" the writ may issue when there is "a judicial usurpation of power". *Id.* at 35, 101 S.Ct. at 190; *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967).

> Use of the writ of mandamus is severely limited to prevent litigants from obtaining appellate review of district court orders which otherwise could not be appealed until final judgment.

In re Lane, 801 F.2d 1040, 1042 (8th Cir. 1986), citing *Allied Chemical Corp.*, 449 U.S. at 35, 101 S.Ct. at 190.

The Eighth Circuit was justified in issuing the writ of mandamus only if Petitioner had established a "clear and indisputable right" to the relief sought based upon a non-discretionary duty of the District Court to honor that right and, importantly, that no other adequate alternative judicial remedies including appeal existed. *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986).

Petitioner has framed the issue by suggesting that the District Court is without power to enter its order of appointment. When the basis for the petition for writ of mandamus is a jurisdictional issue, the challenged assumption or denial of jurisdiction must be plainly wrong. 28 U.S.C. § 1915(d) must be unambiguous and provide a settled guide for the exercise of the District Court's jurisdiction. If a rational and substantial legal argument can be made in support of the action of the District Court, then the petition for mandamus must be denied, irrespective of whether an appeal after judgment

on the identical issue might later prove successful. *Stein v. Collinson*, 499 F.2d 91 (8th Cir. 1974). The Eighth Circuit, in reviewing the petition for mandamus within these principles, rightfully denied the petition.

Rational and Substantial Legal Arguments Support The Position Of The District Court.

That much is conceded by the Petition here. Petitioner acknowledges that "there are many cases which hold that § 1915(d) empowers the court 'to appoint'." Petition In Certiorari, p. 5. Petitioner juxtaposes then the "substantial authority" which construes § 1915(d) to mean that a court may only request. Most importantly to his petition in certiorari here, Petitioner then characterizes the Eighth Circuit's denial of mandamus as only "*effectively* holding that the federal court can compel an unwilling attorney to represent a person making a request for counsel under § 1915(d)." Petition In Certiorari, p. 6, emphasis added.

More correctly, the Eighth Circuit's one-line denial of the writ of mandamus was a reflection of the procedural posture of the case then presented to it. The Eighth Circuit was not presented with an unambiguous statute calling for the nondiscretionary exercise of judicial power. Rather, the petition for certiorari makes the case to the contrary. Allegations of judicial usurpation can be met with rational and substantial legal arguments. The Eighth Circuit is not alone in its construction of 28 U.S.C.

§ 1915(d).[2] *Hodge v. Police Officers*, 802 F.2d 58, 60-62 (2d Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982); *Whisenant v. Yuam*, 739 F.2d 160, 163, n. 3 (4th Cir. 1984) ("Although the statute says that a court may 'request' an attorney to represent an indigent defendant, the cases construe the statute as authorizing a court to 'appoint' counsel."); *McKeever v. Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982) ("Defendants maintain that there was no abuse of discretion because section 1915(d) merely allows a court to 'request' counsel rather than to 'appoint' counsel, but the vast weight of authority in this circuit and elsewhere demonstrates that the power of a court to provide counsel is commonly referred to as power to appoint.", footnotes omitted).

Petitioner incorrectly characterizes the Eighth Circuit decision as "standing alone", and correctly points to *United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986), which expressly rejects the statutory interpretation of section 1915(d) by the Eighth Circuit.[3] The necessity

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[2]Although not asserted by the District Court as justification for its challenged Order, it has been suggested that the District Court may have inherent power to appoint when constitutional rights are involved. See 20 Am.Jur.2d Courts § 79 (1965), *United States v. 30.64 Acres of Land*, 795 F.2d 796, 804 (9th Cir. 1986), n. 16. This potential to avoid the statutory construction issue provides further justification for the denial of the interlocutory petition for mandamus.

[3]Rational legal arguments exist in contradiction to the decision in *Land*. A basis for the Ninth Circuit decision appears to be its belief that there is no provision for payment of these appointments, in apparent disregard of 42 U.S.C. § 1988. That statute providing for payment of fees of prevailing parties is

(Continued on following page)

for certiorari jurisdiction is to resolve conflicts among the circuits on issues of special importance. Supreme Court Rule 17.1. Characterized correctly, there is no conflict to resolve. The denial of the petition for mandamus was, at the time and in its context, the correct decision.

In a factually similar case, *Lewis v. Lane*, 816 F.2d 1165 (7th Cir. 1987), counsel upon learning of his appointment, immediately asked the magistrate to be relieved, alleging incompetency to handle federal civil rights litigation and lack of time. The magistrate denied his request and counsel eventually accepted the appointment "after the magistrate indicated that his membership in the southern district bar might be terminated if he declined the assignment." *Id.* at 1166. The Seventh Circuit acknowledged the inconsistency in their interpretation of § 1915(d), citing *Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed.2d 451 (1983) and *McKeever v. Israel*, 689 F.2d 1315, 1319, n. 8 (7th Cir. 1982).

> We need not choose a definitive definition of "request" in this case because even if consent is required before an appointment is valid under § 1915(d), Adams validly consented to accept the representation of the plaintiffs in this case. . . . Although Adams was a reluctant appointee, he did validly consent to represent the plaintiffs. . . . The Southern District of Illinois requires that members of the bar of that court "be available for appointment by

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(Continued from previous page)

significant in the context of § 1915. At the time of appointment of counsel, the Court has concurrently determined the claims to be not frivolous.

> the court to represent or assist in the representation of those who cannot afford to hire an attorney" . . . [r]eminding an attorney of the consequences of failing to abide by the rules of the district bar of which he is a member does not vitiate the validity of his subsequent consent to follow those rules.

Lewis v. Lane, 816 F.2d 1165, 1168-1169 (7th Cir. 1987).[4]

Petitioner's Appointment Was Part Of A District-Wide Process

As described in his ruling in *Coburn v. Nix*, appendix p. 2a, the District Court of Iowa in response to an Eighth Circuit directive, established a process for appointment of counsel similar to that in *Lewis*. It was from the list of federal practitioners that Petitioner's name was selected for appointment in this case. Although the bar has long recognized its professional duty to provide pro bono representation, which duty is acknowledged by the Petitioner, obviously the fulfillment of that obligation falls upon the individual lawyer.[5] Provision of legal services without fee constitutes a hardship of varying degrees.

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[4]The Seventh's Circuit's position on eligibility requirements was perhaps foretold in *Branch v. Cole*, 686 F.2d 264, 267 (5th Cir. 1982): "If the court continues to have difficulty in obtaining the voluntary service of counsel despite their ethical responsibilities, it may wish to limit the compensated practice by members of its bar to those willing to accept their share of indigent cases."

[5]Ethical Consideration 2-25 of the American Bar Association Code of Professional Responsibility.

> We find merit in the reasoning that there is an implied obligation to perform pro bono trial services on every licensed attorney who is engaged in litigation, not just those who are willing to come forward.

Matter of Snyder, 734 F.2d 334, 339 (8th Cir. 1984). The attorney appointment process implemented by the district court spreads the risk of that hardship, makes more efficient and effective the utilization of practicing attorneys and is soundly rooted in the ethical obligation of each.[6]

Whether Petitioner's service was by appointment or by consent to a federal bar requirement, a rational and substantial legal argument existed in support of the District Court denial of the "motion to dismiss". More importantly, the existence of those rational and substantial legal arguments in support of the position of the District Court not only justified but required that the petition for mandamus be denied by the Eighth Circuit.

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[6]The Ninth Circuit prior to its decision in *United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986), apparently held a similar view:

> "An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order."

United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

Supreme Court Rules 17 and 18 Suggest Denial Of This Petition.

While the question identified by the Petitioner may ultimately be reached on appeal in this underlying action, it is not now the appropriate question presently presented for review by certiorari. Supreme Court Rule 17 requires special and important reasons for the exercise of judicial discretion in granting the writ. Additionally, Supreme Court Rule 18 requires demonstration of "an imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." *Traman, et al., v. Parkin* is still pending in the District Court. Review of a preliminary motion was attempted by Petitioner through interlocutory appeal, a statutory prerequisite for which was denied. The petition for writ of mandamus was then utilized in lieu of interlocutory appeal. Denial of the mandamus results now in a petition in certiorari. Petitioner has failed to show any justification for deviation from the normal appellate process, recognized by Judge Vietor in his order denying the request for inclusion of the 28 U.S.C. § 1292 statement. This petition for certiorari is simply premature. The decision of the Eighth Circuit on the petition for mandamus is not in conflict with the decision of another court of appeals but is in substantial conformity with Supreme Court precedent. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). There is no justification for any further interruption in *Traman, et al., v. Parkin, et al.*

CONCLUSION

For all the foregoing reasons, the petition in certiorari should be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JOHN COBURN,
Plaintiff,

v.

CRISPUS NIX, et al.,
Defendants.

* CIVIL NO. 86-716-B
* RULING DENYING
* MOTION TO DISMISS
* APPOINTMENT OF
* COUNSEL AND ORDER
* DISSOLVING STAY
*
* (Filed June 16, 1987)
*

The court has before it a motion of attorney John D. Cruise to dismiss his appointment under 28 U.S.C. § 1915(d) as counsel for plaintiff. Cruise contends that the court has no power to compel him to serve as counsel for plaintiff.

Plaintiff, an indigent inmate at the Iowa State Penitentiary, brought this action under 42 U.S.C. § 1983 against various prison officials and health care providers alleging inadequacies in health care and living conditions at the penitentiary. After plaintiff's complaint was filed, he asked to have a lawyer appointed. On October 23, 1986 this court ordered the clerk of court to find counsel to represent plaintiff pursuant to 28 U.S.C. § 1915(d). The Volunteer Lawyers Project[1] reported on October 30, 1986 that John D. Cruise had been contacted and was assigned to represent plaintiff.

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[1]The Volunteer Lawyers Project is a joint venture by the Iowa State Bar Association and Legal Services Corporation of Iowa.

After Cruise filed his motion, the court invited the Volunteer Lawyers Project to file an amicus curiae brief, which the Volunteer Lawyers Project did.

THE ATTORNEY APPOINTMENT PROCESS

Before addressing the merits of the motion it will be useful to explain the process by which attorney Cruise was appointed. In *Nelson v. Redfield Lithographic Printing* Chief Judge Lay, writing on the judge's duty to secure legal assistance for the poor, explained:

> We write here under our general supervisory authority involving the district courts. We think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

728 F.2d 1003, 1005 (8th Cir. 1984).

In response to this directive, the judges of this court had the clerk of court prepare a list of attorneys from which section 1915(d) appointments were to be made. Initially, the list was composed of lawyers admitted to practice in this court who had been counsel of record in federal court in connection with five or more civil cases in 1982. Because this list provided a relatively small number of lawyers to bear the brunt of the pro bono assignment load, the list was expanded. Now any attorney admitted to practice in the Southern District of Iowa and in good standing who has appeared as counsel in a

nonbankruptcy federal case in the past five years is eligible for appointment. An alphabetized list of these attorneys was divided into three panels. All appointments for a given year are made out of one panel. Attorneys are asked to serve on a rotating basis within the panel, and the panels are on a three year rotation cycle. Therefore, no attorney should be unfairly burdened with appointments.[2]

A request for appointed counsel is subjected to judicial scrutiny under the following standards. First, the party must be indigent. Second, indigents who are not incarcerated must certify their efforts to contact and hire an attorney. (This requirement is waived for inmates.) Third, the complaint must not be frivolous or fail to state a claim. (A failure to meet this standard results in dismissal on initial review pursuant to Fed. R. Civ. P. 12(b)(6) or 28 U.S.C. § 1915(d).) Fourth, the judge weighs the complexity of the case, whether the facts need further development, and whether plaintiff appears to be capable of presenting the case in a orderly fashion. *See In Re Lane,*

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[2]Further accommodations are made to insure that attorneys are not burdened by pro bono appointments. Attorneys who have accepted pro bono cases in state court within the preceding year are not asked to take a federal appointment. Also, if an attorney has a busy schedule when called, the Volunteer Lawyers Project will permit the attorney to defer appointment to a time where the attorney's schedule will permit. Finally, some consideration is given to the distance the attorney would have to travel to represent a client. An attorney in southwest Iowa, for example, would be appointed to represent someone in a county jail somewhere in that region rather than an inmate at the Iowa State Penitentiary in Fort Madison in southeast Iowa.

801 F.2d 1040, 1042-45 (8th Cir. 1986). The court orders appointment of counsel only if all of these criteria are met. The clerk of court then sends a copy of the order to find counsel to the Volunteer Lawyers Project.

COURT POWER TO APPOINT ATTORNEYS TO REPRESENT INDIGENT CIVIL LITIGANTS

Cruise does not seek leave to withdraw for good cause pursuant to Local Rule 1.5.7. Rather, he makes a frontal challenge to the court's power to appoint him to represent plaintiff. First, Cruise argues that the court lacks power to appoint attorneys to represent inmates in suits under section 1983. Second, he argues that if the court has such a power, it is limited to "active litigators", which Cruise professes not to be. Therefore, he argues, the court did not have power to appoint him to represent plaintiff, and the appointment should be dismissed, or otherwise dissolved. This court rejects both contentions.

Congress has authorized courts to obtain legal counsel for indigent plaintiffs in civil actions. "The court may request an attorney to represent any such person unable to employ counsel. . . ." 28 U.S.C. § 1915(d). Cruise contends that section 1915(d) grants no coercive power to the court, but only provides the power to "request". The Eighth Circuit Court of Appeals has rejected this interpretation:

> The district court ruled that it had no *power* to appoint counsel to represent an indigent in civil cases. This ruling overlooks the express authority given it in 28 U.S.C. § 1915 to appoint counsel in civil cases. This court and other courts of appeals regularly make these appointments in habeas corpus and civil rights cases.

Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971) (per curiam) (footnote omitted). *See also In Re Lane*, 801 F.2d 1040, 1043 (8th Cir. 1986); *Hahn v. McLey*, 737 F.2d 771, 774 (8th Cir. 1984) (per curiam); *Nelson v. Redfield Lithographic Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984). The Fourth Circuit Court of Appeals recently noted that, "[a]lthough the statute says that a court may 'request' an attorney to represent an indigent defendant, the cases construe the statute as authorizing the court to 'appoint' counsel." *Whisenaut v. Yuam*, 739 F.2d 160, 163 n.3 (4th Cir. 1984). Other courts construing the statute have viewed the statute as empowering the court to appoint a lawyer. *See Hodge v. Police Officers*, 802 F.2d 58, 60-62 (2d Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982); *McKeever v. Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982). *But see Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982) ("a court has the authority only to *request* an attorney to represent an indigent, not to require him to do so.") (emphasis in original), *cert. denied*, 459 U.S. 1214 (1983). This court concludes that the appointment of Cruise is authorized by the power granted by Congress in 28 U.S.C. § 1915(d).

The section 1915(d) appointment power is consistent with every attorney's ethical obligation to provide legal services to the poor. The Iowa Code of Professional Responsibility For Lawyers provides: "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer." Iowa Code of Professional Responsibility For Lawyers EC 2-27. Attorneys admitted

to practice in the Southern District of Iowa take an Oath of Admission that provides in part: "I do solemnly swear . . . I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, . . . so help me God." Local Rule 1.5.5.

Cruise also argues that if the court has power to appoint, the power is limited to "active litigators." This limitation is nowhere expressed in any case authority cited by Cruise or found by this court. When the Eighth Circuit Court of Appeals has written on appointments under 28 U.S.C. § 1915(d), the court has not expressed or implied such a limit. On the contrary, the court has stressed the necessity to provide "competent" representation. *See Nelson*, 728 F.2d at 1005.[3]

Even if the court's power were limited to appointing "active litigators", Cruise could not evade appointment on the ground that he is not an active litigator. He has participated as counsel more than once recently in contested litigation in this court. *Amy Chu, a minor, by her next friend and guardian Robert Chu, v. The Iowa City Community School Board, et al.*, Civil No. 84-73-D-1; *Barbara and Darrell B., as next friends of Drew B., v. Dr. Robert Benton, et al.*, Civil No. 84-97-D-2; *Area Education Agency, et al., v. Stephen Smith, et al.*, Civil No. 84-370-B. Just a few months ago, in *Area Education Agency*, a case tried by me, he actively participated in a three day trial of a factually and

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[3]Rules governing admission to practice in this court and requiring continuing legal education are designed to assure a minimal level of competence among members of the federal bar. Cruise has satisfied these requirements and is presumed competent.

legally complex case. He cross-examined witnesses. He signed and filed a forty page trial brief, and he cosigned with other counsel and submitted a twenty-two page proposed findings of fact and conclusions of law.

RULING AND ORDER

In sum, the court's appointment of Cruise to represent plaintiff is authorized by section 1915(d). The motion to dismiss appointment of counsel is denied. The order staying proceedings pending disposition of the motion to dismiss appointment of counsel is dissolved.

DATED this 16th day of June, 1987.

/s/Harold D. Vietor
HAROLD D. VIETOR,
Chief Judge
Southern District of Iowa

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN, et al., Plaintiffs,	* CIVIL NO. 87-317-B
v.	* RULING
STEVE PARKIN, et al., Defendants.	* DENYING * REQUEST TO * AMEND AND * APPLICATION * FOR STAY

(Filed November 5, 1987)

John E. Mallard, plaintiff Traman's court-appointed counsel, has filed a request to amend order to include statement prescribed by 28 U.S.C. section 1292(b) and application for stay order.

Rule 1292(b) provides in part:

> When a district judge, in making an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

I believe there is substantial ground for difference of opinion. However, I do not believe that an immediate appeal from my ruling would materially advance the

ultimate termination of this litigation, which is Mr. Traman's litigation against the defendants.

Therefore Mr. Mallard's request to amend order and his application for stay of order are denied.

DATED this 5th day of November, 1987.

/s/Harold D. Vietor
HAROLD D. VIETOR,
Chief Judge
Southern District of Iowa